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IN THE

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1969.

No. 1260

PEPPERELL MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Pepperell Manufacturing Company, herein referred to as "Petitioner" (or the "Company"), petitions for a writ of certiorari to review the Decision of the United States Court of Appeals for the Fifth Circuit entered in this case on November 13, 1968.

OPINIONS BELOW.

The Opinion of the Court of Appeals (Appendix D, *infra,* pp. A-25-30) is reported at 403 F. 2d 520. The Opinion of the Court Below denying the Petition's Motion for Rehearing is herein attached to this Petition

as Appendix G. The Decision and Order of the National Labor Relations Board[1] is reported at 166 NLRB No. 24, attached to this Petition as Appendix B.

JURISDICTION.

The Judgment of the Court of Appeals was entered December 2, 1968 (Appendix E, *infra*, pp. A-31-32). The Petitioner filed a Petition for Rehearing on December 12, 1968 (Appendix F, *infra*, pp. A-33-51), which was denied by the Court Below on January 21, 1969 (Appendix G, *infra*, p. A-52). The jurisdiction of this Court is invoked under 28 U. S. Code 1254 (1).

QUESTIONS PRESENTED.

Do the Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Section 10 of the National Labor Relations Act require that a formal hearing be afforded a party alleged by the Board to have committed an unfair labor practice under the National Labor Relations Act in circumstances where disputed issues of material fact are shown to exist which directly affect the validity of the legal conclusion upon which the Board's finding is predicated?

May a Court of Appeals properly impose a different legal standard in its review of Board findings in refusal

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[1] References to the Transcript of Record and the Supplemental Transcript of Record, both printed as Volume I, are designated as "TR" and "STR" respectively. References to testimony and exhibits, printed in the Joint Appendix, are designated as "JA". For convenience, the National Labor Relations Board is hereinafter referred to as the "Board"; the Textile Workers' Union of America, AFL-CIO, CLC, the Charging Party in the proceedings alleging unfair labor practices upon which the Board's Order is based, and referred to as the Petitioner in the election proceedings in 1965 and 1966, is herein referred to as the "Union"; and the Petitioner herein is referred to as the "Company."

to bargain cases (directly dependent upon Board findings as to the validity of representation elections) than the standard applicable in the Court's review of Board findings in other types of unfair labor practice cases?

STATUTES INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 USC 151, et seq.) are set forth in this Petition, Appendix A, pp. A-1-7.

STATEMENT.

This is a case in which, in the absence of a hearing to determine crucial issues of fact, the Court below enforced an Order of the Board directing the Petitioner to bargain with a labor organization as the exclusive representative of all its production and maintenance employees and finding that the Petitioner had violated Section 8 (a) (5) of the Act as a result of its refusal to do so. The Order of the National Labor Relations Board, enforced by the Decision of the Court Below, found a violation of Section 8 (a) (5) of the Act on the basis of a Summary Judgment on pleadings and without a hearing. The Summary Judgment was based on the Board's *ex parte* factual findings arising out of Objections to two Representation Elections conducted in 1965 and 1966, respectively. The Petitioner has never had an opportunity to be heard on its Objections to the material misrepresentations made by the Union, which were asserted in its Objections to the second election, and reasserted in its Opposition to Summary Judgment. The misrepresentations which affected the results of the election were made under circumstances which did not permit the Company to correct them by adequate reply, prior to the election.

Despite the absence of a hearing, which the Court Below did not discuss and refused to consider even upon Petition for Rehearing, the Board's *ex parte* factual determinations were treated as though having been arrived at following a full hearing in which evidence had been submitted and witnesses examined under oath. The Court Below accepted the Board's determination that in the second election, Union misrepresentations immediately preceding the election did not result in unfairness in the conduct of the election because the Company was said to have had ample time to answer the misrepresentations. The Board's determination, which the Court adopted, was contradicted by Record evidence in affidavit form from the Company which showed that there was in fact not ample opportunity to ascertain the true facts in time to reply before the election. The fact that the Union had made misrepresentations was not known or established by the Company until after the election was held, according to undisputed Record evidence. Neither the Board nor the Court directed a hearing to determine these disputed facts, nor did either in the alternative treat the factual evidence submitted by the Company in the *ex parte* proceedings as being uncontradicted or in the light most favorable to the Company in keeping with Summary Judgment practice. In this posture, the failure to provide Petitioner an opportunity for a hearing to resolve the factual disputes (although such hearing was sought by Petitioner throughout the Proceedings) constituted, we submit, a deprival to it of its right to due process of law. Summary judgment, by its very nature, presupposes the absence of any substantial or material issue of fact. Crucial, disputed issues of fact were shown to exist in the Record here, but were ignored by the Board and also by the Court Below.

The reviewing authority and responsibility of Courts of Appeals under the statute is to determine whether the Board's decision in finding that an unfair labor practice

has been committed is supported by "substantial evidence in the Record considered as a whole". Under the directions of this Court, the Court Below was obliged to consider not only the evidence which supported the Board's Decision, but ". . . whatever in the Record fairly detracts from its weight".[2] The Court Below accepted the Board's sub-
(1951).
jective, *ex parte* finding, which was not based upon the evidence and was specifically contrary to the uncontradicted evidence that the Company could not obtain the true information in time to have an opportunity to reply to the Union's misrepresentations prior to the election. The failure of the Court Below to acknowledge that the Company's evidence as to these facts was uncontradicted resulted in its failure to adhere to and conform to the holdings of this Court in **Universal Camera**, *supra*, in rendering its Decision. The Board's failure to provide a hearing and its use of the Summary Judgment device in making its Decision thus had the initial effect of depriving Petitioner of any forum to present its evidence and, as a consequence, of due process of law. The Summary Judgment procedure had the secondary effect of leading the Court Below to an erroneous standard of review.[3]

The First Election.

On January 20, 1965 the Union filed a Petition for Election, which was held by agreement of the parties on March 5, 1965. The secret ballot election resulted in the Union's receiving 959 votes, short of the necessary majority of the votes cast by a total of 2,183 voters in the election (TR 29-30). Union objections alleged five grounds for invalidating the results (TR 32-33). An *ex parte* investigation by the Board's Regional Director resulted in his findings (STR 1-12) that the evidence did not support Objections

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[2] **Universal Camera Corp. v. NLRB**, 340 U. S. 474 at 488

[3] **NLRB v. Walton Mfg. Co.**, 369 U. S. 404 (1962).

2, 3, 4, or 5 and a hearing was directed limited to Union Objection 1. Exceptions were filed by the Company and the Union (TR 34-35; 36-39). The Board directed a hearing limited to the alleged credibility issues raised by Objection 1 and deferred its disposition of the remaining exceptions (STR 163-165). Disputed testimony before the Hearing Officer in the limited hearing resulted in the Board's setting aside the first election. The Board's Hearing Officer inferred that statements made to or in the presence of seven employees by three minor supervisors were also made to all fifty employees of the three supervisors, and constituted threats made in "wholesale fashion by supervisors to all their employees" (TR 47).[4]

Nonetheless the Court affirmed the Board's finding that the election should be set aside because the Company inferred in its literature that "selecting the Union meant a plant shutdown and consequent economic disaster" (Page

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[4] The Court overlooked or ignored the absence in the Record of substantial evidence to support the Board's finding that three of the Company's minor supervisors made threatening statements to fifty employees. The disputed evidence was that three minor supervisors made allegedly threatening statements in the presence of seven employees. The only "admission" by the supervisors concerning other than the seven who testified, was to "admit" that they had made legally permissible statements to other employees who worked under their supervision. The Board apparently adopted the theory that the isolated statements found to have been made were spread "word of mouth". Such theory has been recently discredited by another Court of Appeals. See:

> "To begin with, there were only these three isolated events in a plant comprising some six hundred employees and sixty supervisors. We are told now that undoubtedly these conversations were passed on from employee to employee by word of mouth, thus increasing their over-all impact. This theory is not analytically inevitable, since the above stated conversations were not such as to become a conversation piece among the employees. **Further, we will not now speculate about a matter on which testimony could easily have been elicited if it had been thought important."**
>
> **NLRB v. Garland Corporation, 396 F. 2d 707, 709 (1st Cir., 1968)** (Emphasis supplied).

5, Appendix D, *infra* page A-28). The finding did not purport to be based on the whole Record or a Record made as a result of a hearing, for it did not take into account or even consider the Union's propaganda to which Company literature was responsive. Despite the absence of any hearing in this regard and the absence of a Record upon which its finding could be based the Court determined that the Board had not "abused its discretion" and that the first election was properly set aside.

The Second Election.

The second election which was directed by the Board on June 13, 1966, was held on August 4, 1966. The Union achieved a majority of the ballots cast, receiving 1,139 of 2,191 votes. The Union utilized the period preceding the election to engage in a campaign of misrepresentation, which is detailed in the uncontradicted affidavit of assistant plant manager Robert F. Horsley, which was given to the representative of the Regional Director conducting an *ex parte* investigation of the Company's timely objections to the results of the second (1966) election (TR 72-78, 158-177). Attached to the Horsley affidavit are various publications signed by the Union itself, or signed with one or more of the several names used by its alter ego, e. g. "Organized Workers of Floyd County", which the Union here involved circulated and distributed (STR 189-277). The contents of this affidavit were not disputed by any evidence in the Record. The Union's campaign of irresponsible promises and misrepresentations of fact to employees continued in the second election campaign, as in the first (e. g., STR 193-194; 203; 214-217; 220-226; 227-236; 241-243; 250-252; 253-264; 270-272).

Both the Court Below and the Board only referred to one of the several objections filed by the Petitioner to Union conduct and literature. The wage misrepresentations discussed by the Court below were not the only objection-

abie conduct engaged in by the Union;[5] however, these other Union misrepresentations were at least arguably known to the Company prior to the election.

It was within a framework of deliberate misrepresentations that the Union chose to misrepresent the wages and

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[5] In a leaflet handed out on July 28, 1966, the Union maintained that the employees were not provided by the Company with a retirement program and that they were limited to Social Security benefits on retirement (STR 220-221). The truth was that the profit-sharing pension program covering employees of the Company was made effective January 1, 1965, and was announced to employees following the election in 1965 (TR 165-167). With the large number of employees added to the rolls since the beginning of the year, a substantial number had not been advised of the nature of the pension program or the benefits provided by it. A subsequent leaflet which the Union passed out on the day before the election characterized the Company's pension plan as providing $5.00 per month for an employee with more than 50 years of service (STR 266). This false statement did not provide the Company with an opportunity to reply with the facts that an employee at 65 years of age with 40 years of service could, from contributions anticipated, acquire insurance to pay him guaranteed monthly income of $170 per month of life (TR 166-167; STR 273-274).

On July 26, a Union leaflet misrepresented to the workers the profit picture of the textile industry in relationship with other industries, as did an earlier leaflet handed out on June 20 (STR 214-215, 202). These and other misrepresentations are detailed in the uncontradicted Horsley affidavit (TR 72-78).

On the morning of the election the Union circulated a leaflet which included "our prediction" that if the employees did not vote for the Union that the Company would:

(1) Lay off older workers in the very near future;

(2) Cut the wages of employees; and

(3) Double the workloads;

(4) Promote new employees to higher paying jobs over older employees;

(5) Demote employees and show partiality (STR 270-271).

The Regional Director, upon Objections subsequently filed, concluded that this merely constituted a prediction of general results of the employees' failure to organize, and as such that it constituted legitimate campaign propaganda. Neither the Board nor the Court disturbed this finding or regard any of the objectionable conduct as having other than *"de minimis"* effect, in sharp contrast to the findings regarding the first election.

benefits of unionized workers in Rome, Georgia, at a time when it would be unlikely that the Company could obtain the actual facts in time to reply. The misrepresentations related to alleged negotiated wage rates by unions who were members of the Rome, Georgia Labor Council, of which the Textile Workers Union was a participating member. The Rome Labor Council was a co-sponsor of the Union's election campaign at the Petitioner's plant.

The Board's Regional Director found that the Union prepared and published (TR 85) in a Rome newspaper on Sunday, July 31, 1966, over the alleged signatures of "The Organized Workers of Floyd County," a summary of alleged benefits which were received by workers under union contracts in plants represented by the Unions which made up the Rome Labor Council. This "message" (STR 227-236) was entered in the newspaper by the Union here involved as a paid political advertisement for the purpose of influencing the voters at Petitioner's plant in the election. The Union then distributed at the gates a leaflet containing the same wage misrepresentations on the eve of the election.

In the advertisement, and the subsequent leaflet distributed at the gates, the Union falsely misrepresented wages, earnings and fringe benefits received under Union contracts in the immediate area of the Petitioner's plant. Neither the Petitioner nor its employees were in a position to know or learn in time for effective reply what the true wages and benefits are that are received by workers in unionized plants in the locality. Such information primarily lies within the special knowledge of the employees who receive them or in the knowledge of the unions and companies who are parties to the contracts. The Union did not sign its name to the leaflet it distributed, but, rather, the names of the Local Unions and "employees" who allegedly negotiated the contracts and received such rates and benefits. This did much to insure that the mis-

representations would be effective. The Union here was responsible for sponsoring the misrepresentations, as the Regional Director found (TR 85). This finding was not upset by the Board or the Court below. The Petitioner was unable to obtain the necessary information which established the untruthfulness and the extent of the Union's misrepresentations in the publications until after the election had been held.

In support of its Objection No. 5 (TR 75-76) the Petitioner supplied the Regional Director undisputed evidence that the Union had falsely represented the wage rates in plants under Union contract in the immediate locality of Rome. Specifically, the Petitioner showed:

1. General Electric employees do not receive $3.21 per hour on the average, as asserted by the Union, but rather receive $2.91 on an average, or 30 cents an hour less than claimed by the Union and its Central Labor Council alter ego. This constitutes a misrepresentation of approximately 10% as to the average wage of these employees.

2. Rome Kraft employees received average earnings of $2.86 per hour, rather than $3.10 as the Union claimed, or 24 cents per hour less than claimed by the Union, amounting to a misrepresentation that the employees were receiving 8% more than they were.

3. Inland Container Corporation employees are paid an average rate of $2.54 per hour, rather than $2.75—21 cents per hour less than claimed by the Union, or a misrepresentation of approximately 7%.

4. A & P employees do not receive $113 per week for 40 hours of work, with one exception.

5. The Petitioner learned on the day of the election that at least one of the Local Unions allegedly endorsing the newspaper ad had not authorized the

Union to use its name, according to the undisputed facts in the Regional Director's Report, which the Board did not disturb. The Teamsters representative disavowed the use of the Local's name on behalf of employees and members of Carolina Freight Carriers STR 272-273).[6]

We submit that all of the elements which establish that the Company's constitutional right to due process was denied by the Board as a result of the denial of a hearing are present here, and that the Decision of the Court misapprehended or overlooked this issue in the posture in which it considered this case.

(a) There were misrepresentations of fact (conceded by the Regional Director and the Board) as to wages obtained by the Unions under their contracts in the Rome area. (These were the same unions who acted as co-

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[6] On the day of the election, after a majority of the employees had voted, the Petitioner first discovered the falsity of this representation made by the Union. The name signed to the newspaper advertisement, and to the leaflet distributed on the eve of the election on August 3, was "Local 515, Carolina Freight Carriers' Workers". As established by the evidence submitted to the Regional Director (affidavit of Horsley, TR 162-164) of all the companies mentioned in the advertisement, the employees of this freight carrier had the closest working relationship with the employees of Petitioner. The employees of this freight carrier handled and delivered about 50% of all the incoming shipments of Petitioner's plant. Too late to make any effective reply, Petitioner discovered that the employees of Carolina Freight Carrier had not authorized the use of their name in any advertisement or leaflet to the employees of Petitioner, and certainly they had not placed any advertisement in the paper as the advertisement falsely led the employees to believe. The Regional Director determined that neither the Teamsters Union which represents Carolina Freight Carriers' Workers, nor the employees, had endorsed the ad of July 31. He found that a representative of the Teamsters' Union had actually set about to correct the misrepresentations, but was unable to do so; nonetheless, even though the Union knew the falsity of it, the article was thereafter distributed as a leaflet at the gates of the plant on August 3 (TR 86-88).

sponsors with the Textile Union in its efforts to organize the plant.)

(b) There was undisputed evidence that the misrepresentations had an impact on the employees prior to the election, and that they were substantial, material, and consistent with the Union's campaign theme that voting for the Union would result in the Company's employees receiving the wage rates and benefits of other unionized employers in the Rome area;

(c) There is clear evidence that the misrepresentations were made in the name of and by persons whom the employees at the Company's plant would have every reason to believe were in the best position to know the true facts.

(d) There is at the very least a material dispute of fact as to whether or not the Company had ample time to reply to, or correct the Union's misrepresentations.

Other more subtle claims were also shown to be false by the evidence (TR 171-175). The facts in the Record are completely undisputed that the Petitioner did not learn of the falsity of the wage representations until after the election, could not reply to them prior to the election, and that these wage misrepresentations had substantial impact upon the eligible employees.

The Ex Parte Proceedings.

Following an *ex parte* investigation of the second election, the Board's Regional Director issued a Report on Objections (TR 79-97). Timely Exceptions were filed to the Regional Director's Report. The Board in overruling the Exceptions and certifying the results of the second election was silent as to any of the obvious inaccuracies contained in the Regional Director's Report, with one exception. In connection with Objection No. 5, the Board

sought to cure the fatal defect in the Regional Director's determination that the wage misrepresentations were insufficient to cause the election to be set aside on the asserted grounds that (1) the Employer had opportunity to reply; and (2) that the Union was not shown to have "special knowledge" as to the facts concerning wages it had published and circulated on behalf of itself and its co-sponsors in the campaign (who knew the facts) to all employees on the day preceding the election (TR 88).

Following the Union's certification (TR 110-113) and the Petitioner's determination to contest the validity of the Board's determinations by refusing to bargain with the Union (the sole method provided in the Act for testing an improper certification of a union), a Board Complaint was issued upon refusal to bargain charges filed by the Union (TR 118-122). A Motion for Summary Judgment on the Pleadings thereupon was filed by the Board's General Counsel (TR 125-130). The Trial Examiner's "Show Cause" Order issued thereafter (TR 135-136).

In response to the "Show Cause Order", the Petitioner established through the uncontradicted affidavit of Horsley (TR 152-158), *inter alia,* that it did not become aware of the fact that the wage claims were misrepresentations until **after** the election had been conducted (TR 154). The Regional Director had found that the Union was itself responsible for the misrepresentations published under the name of its alter ego and ally, "The Organized Workers of Floyd County", by preparing both the advertisement and the subsequent leaflet and circulating them at the plant gates on the day before the election (TR 156; TR 85). It was also established that while the Sunday newspaper ad had little apparent impact, the leaflet caused "a great deal of discussion" and had ". . . the effect of creating much conversation in the plant" (TR 153; 155).

The Board affirmed the Trial Examiner's findings based upon his Motion for Summary Judgment. The Trial Examiner held:

> "It has been seen that the questions as to the validity of the two elections, the merits of the Respondent's contentions with respect to each, and whether the Union should be certified, were raised before and decided by the Board in the representation proceeding. It is thus clear that Respondent seeks to relitigate these issues here . . . The Trial Examiner has not authority to review the Board's final dispositions of the representation issues or to question its conclusions made on the existing record. The Respondent is free, in exceptions to this Decision, to request the Board to reconsider the determinations in the representation case, and, in the event of an unfavorable final order by the Board, the Respondent may request review of the determinations in an appropriate Court of Appeals . . . The refusal to bargain being established, as is hereinafter found, there are no issues litigable before a Trial Examiner, and therefore no matter requiring hearing. Accordingly, the General Counsel's motion for summary judgment is granted . . ."
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> (Tr. 181-183)

In view of the Board's Order, based upon its grant of Summary Judgment without a hearing, Petitioner regarded the posture of the case before the Court below as presenting no disputed issues of fact. The Court Below specifically found that the Petitioner had ample time to answer the wage misrepresentations (Page 7, Appendix D, *infra,* page A-30) despite the contradiction in the Horsley affidavit which was the only evidence in the Record in this regard. Petitioner submits that in view of the failure to regard the evidence tendered by the Petitioner as having been proven, as well as being undisputed, the *ex*

parte proceedings, without any opportunity for a Hearing constituted a deprivation of procedural due process of law.

REASONS FOR GRANTING THE WRIT.

I.

The Failure to Afford Petitioner a Hearing Constituted a Denial of Due Process of Law.

In **Morgan v. United States**, 304 U. S. 1 (1938), Chief Justice Hughes observed:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party **and to meet them.** The right to submit argument implies that opportunity; otherwise the right may be a barren one . . ."
>
> *Supra,* at page 18

Due process of law demands that where there is a substantial and material issue of fact relating to the validity of a representation election which is a basis of a finding of a refusal to bargain "a hearing must be conducted at some stage of the administrative proceedings before the objecting party's rights can be affected by an enforcement order." **NLRB v. Bata Shoe Company,** 377 F. 2d 821, 825 (4th Cir., 1967), **cert. den.** 389 U. S. 917 (1967).

Sworn evidence tendered by the Petitioner made out a *prima facie* case in support of its objections to the second election. Of more significance here, however, is that Petitioner's evidence at least made out a clear case for a factual hearing on the unfair labor practice charge rather than the disposition by a Summary Judgment Order. Unless the evidence had been treated in the light most

favorable to the Petitioner, a treatment which was not given it by the Board nor the Court Below, then the Petitioner was as a matter of law entitled to the hearing it requested in its Response to the Motion for Summary Judgment (TR 140-145). In the language of the Tenth Circuit in treating a similar issue:

> "While the Board may in the exercise of its administrative discretion deny an opportunity for hearing in the representation proceedings on evidence elicited by post election investigation, Respondent is entitled to produce in this unfair labor practice proceeding any additional relevant evidence bearing upon the critical issue. . . . **All of this proffered evidence having been rejected as immaterial stands as admitted** for the purposes of review."
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> **NLRB v. Ideal Laundry & Dry Cleaning Co., 330 F. 2d 712, 716 (10th Cir., 1964)** (Emphasis added).

The refusal of the Court Below to order the case remanded for a hearing, in the light of its failure and the Board's failure to regard as undisputed the evidence tendered by Petitioner in support of objections to the second election, is contrary to the concept of due process as enunciated by this Court, other Courts of Appeal and virtually every other panel of the Court Below. See **NLRB v. Indiana & Michigan Electric Co.**, 318 U. S. 9 (1943); **Greene v. McElroy**, 360 U. S. 474, 507 (1959); **NLRB v. Joclin Manufacturing Company**, 314 F. 2d 627 (2nd Cir. 1963); **NLRB v. Bata Shoe Company**, 4th Cir., *supra*; **NLRB v. Lord Baltimore Press, Inc.**, 300 F. 2d 671 (4th Cir., 1962); **NLRB v. Capital Bakers, Inc.**, 351 F. 2d 45 (3rd Cir. 1965); **NLRB v. Ideal Laundry & Dry Cleaning Company**, 10th Cir., *supra*; **NLRB v. Smith Industries**, 403 F. 2d 889 (5th Cir., 1968); **Tyler Pipe & Foundry Company v. NLRB**, 5th Cir., No. 25146, decided February 11, 1969, 59 LC Paragraph 23,481.

The Record establishes that the Petitioner at no point has been afforded a hearing on its objections to the second election, which raised substantial and material factual issues and were supported by substantial evidence, making out a *prima facie* case as to the validity of those objections; or a hearing on issues which the Board considered determinative in the first election; or a hearing prior to its being found in violation of Section 8 (a) (5) of the Act. The issues raised by the Petitioner in both the elections presented not only questions of fact, but questions of what other panels of the Court Below have termed "adjudicative facts" which involved ". . . who did what, where, when, how, why, with what motive or intent. . . ." **NLRB v. Smith Industries, Inc.**, *supra*, at 892.

Administrative agencies, such as the National Labor Relations Board, have been granted broad powers which combine executive, legislative and judicial functions. In order that exercise of such powers, particularly fact finding, should not breach Constitutional protections, Congress provided review by the Court of Appeals. Findings of fact by the Board most directly affect the rights of parties litigant before it. It is in the exercise of this most important function that an agency's actions should be most carefully reviewed, for the facts found must be supported by substantial evidence.

As this Court reminded the Court of Appeals in **NLRB v. Indiana-Michigan Electric Company**:

> "The Act affords a great degree of finality to the Board's findings of fact and this Court has been insistent that the admonition of the Act be strictly observed. But Courts which are required upon a limited review to lend their enforcement powers to the Board's Orders are granted some discretion to see that the hearings out of which the conclusive

findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the Court is given discretion to see that before a party's rights are finally foreclosed, his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings is heard and weighed."

Supra, 318 US, at 28

Accord: **Greene v. McElroy,** 360 US 474, at 507 (1959). The Decision Below upholds the unsupportable proposition that even when basic facts are proffered which go to the heart of the substantive law determinative of a controversy, an administrative agency may nevertheless ignore evidence and make contrary factual findings in an *ex parte* proceeding. The denial of a right to present and have considered such "adjudicative" facts, determinative of the outcome of the controversy, is not only an inherent denial of due process of law, but also contrary to the express provisions of the National Labor Relations Act.

The terms of the statute concerning unfair labor practice hearings are explicit:

"Section 10 (b) of the Labor Management Relations Act, with reference to procedure upon complaint of violation, requires a hearing. It further provides: '* * * The person so complained of shall have the right to file an answer to the original or amended complaint **and to appear in person or otherwise and give testimony at the place and time fixed in the complaint.** 29 U. S. C., § 160 (b)."

NLRB v. Capital Bakers, Inc., 351 F. 2d 45, at 51 (3rd Cir., 1965). (Emphasis added.)

See also: **NLRB v. Poinsett Lumber & Manufacturing Company,** 221 F. 2d 121, 122 (4th Cir., 1955); 29 C. F. R. 102.69 (c).

The right not only inures from the statute in unfair labor practice cases, but has been held to be the Constitutional standard for due process of law in cases where the unfair labor practice findings are based upon election proceedings.

It is well settled that once the objecting party has supplied *prima facie* evidence which presents "substantial and material factual issues" which would warrant setting aside the election, it is entitled to a hearing as a matter of law. See: **NLRB v. Bata Shoe Company,** 4th Cir., *supra*; **NLRB v. Ortronics, Inc.,** 380 F. 2d 237 (5th Cir., 1967); **NLRB v. Smith Industries, Inc.,** 5th Cir., *supra.* This is consistent with the entire body of law pertaining to Summary Judgment:

> "Summary judgment can be granted only when there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."
>
> **Keating v. Jones Development of Missouri, Inc., 398 F. 2d 1011, 1013 (5th Cir., 1968).**

Accord: **Sartor v. Arkansas Natural Gas Corp.,** 321 U. S. 620, 627 (1944); **Associated Press v. United States,** 325 U. S. 1, 6 (1945); **Pollet v. Columbia Broadcasting System,** 368 U. S. 464, 472-473 (1962); **Stevens v. Howard D. Johnson,** 181 F. 2d 390, 394 (4th Cir., 1950); 6 Moore, Federal Practice, 56.15 (2 ed., 1966); Federal Rules of Civil Procedure, 56 (c).

The Board could not legally find that the Company had refused to bargain by utilizing a Summary Judgment procedure unless it also had found that there were no disputed issues of fact to be resolved at a hearing. The Company had proffered sworn evidence in connection with

the second election (upon which results the Certification of the Regional Director was predicated) that the Union had misrepresented material facts which affected the employees involved and, as a consequence, the outcome of the election, at a time and under circumstances which prevented the Company's having an adequate opportunity to reply to such misrepresentations (TR 154-155; 171-175). If the Company's proffered evidence was true, then by virtue of past decisions of the Board and the Courts, the election should have been set aside and the Certification rendered invalid. **NLRB v. Trancoa Chemical Corp.**, 303 F. 2d 456 (1st Cir., 1962); **Schneider Mills, Inc. v. NLRB**, 390 F. 2d 375, 380 (4th Cir., 1968). The Company's tender of this evidence made a *prima facie* case for the setting aside of the election and cause for the Board to reserve judgment on the facts and circumstances until they were "sufficiently developed to enable the Board to be reasonably certain that it is making a correct determination of law." **Palmer v. Chamberlain**, 191 F. 2d 532, 540 (5th Cir., 1961); **NLRB v. Smith Industries, Inc.**, *supra.* The Court Below was obliged to deny enforcement until this was accomplished. The only alternative consistent with due process of law would have been for the Court Below to have construed the undisputed evidence submitted by the Company in its affidavits—in the words of its Chief Judge Tuttle, "most strongly from the standpoint of the Company." **Neuhoff Brothers Packers, Inc. v. NLRB**, 362 F. 2d 611, 613 (5th Cir., 1966). This was not done. Since the Horsley affidavit was the **only** evidence on this crucial issue before the Trial Examiner of the Board, the Decision of the Board in finding violation of Section 8 (a) (5) was clearly not supported by substantial evidence in the Record considered as a whole.

In Summary Judgment proceedings, the evidence must be considered in the light most favorable to the party against whom judgment is made. The doctrine enunciated

in the **Neuhoff** case, and which was ignored by both the Board and the Court Below in this instance, is consistent with the doctrine enunciated by this Court and the other Courts of Appeal, to wit: **U. S. v. Diebold,** 369 U. S. 654, 655 (1962); **Stevens v. Howard D. Johnson,** 181 F. 2d 390, 394 (4th Cir., 1950); **Bohn Aluminum & Brass Corp. v. Storm King Corp.,** 303 F. 2d 425, 427 (6th Cir., 1962); **Walling v. Fairmount Creamery Co.,** 139 F. 2d 318, 322 (8th Cir., 1943). In **Sonoco Products Company v. NLRB,** 399 F. 2d 835 (9th Cir., 1968), the Court found that a hearing on the "totality of circumstances" was required and went on to say:

> "Petitioner has raised a substantial and material factual issue as to whether, in combination, **all of the circumstances** on which it relies presented a fair election. Therefore we conclude that unless the Board assumes the truth of (plant manager) Hughes' allegations regarding Gonzales' conduct and status as a union agent it must grant a hearing with respect to those issues . . ." (Emphasis original.)
>
> *Supra,* at page 843

The voters in the second election were the persons to whom the misrepresentations were directed. Their intentions and their true choice in the election must necessarily have been deemed materially affected by the misrepresentations, a conclusion inferred by both the Board and the Court Below, from their findings that there was opportunity to reply by the Company. However, an issue of this case is the issue of subjective motive which the Board has decided without considering the full and complete record made at a hearing. As this Court has observed:

> "Summary judgments . . . are not appropriate where motive and intent play leading roles . . ."
>
> **White Motor Company v. United States, 372 U. S. 253, 259 (1963).**

An incomplete record does not permit accurate inference by the Board, or a proper review of its findings by the Courts of Appeal. Similarly, as the Ninth Circuit stated in **Consolidated Electric Co. v. United States**, 355 F. 2d 437, 438-439 (9th Cir.), and cited by the Fifth Circuit in the well-reasoned **Smith Industries** decision (decided by another panel of the Court Below the day before its decision in the instant matter):

> ". . . when an issue requires determination of state of mind, it is unusual that this disposition may be made by summary judgment. See Alabama Great Southern Railroad v. Louisville and Nashville Railroad, 224 F. 2d 1, 5 (5th Cir., 1955). It is important, and ordinarily essential, that the trier of fact be afforded the opportunity to observe the demeanor, during direct and cross-examination, of a witness whose objective motive is at issue."

See also: **U. S. v. Diebold**, 369 U. S. 654, 655 (1962); **Peckham v. Ronrico Corp.**, 171 F. 2d 653, 657 (1st Cir., 1948); **Doehler Metal Furniture Company v. U. S.**, 149 F. 2d 130, 135 (2nd Cir., 1945); **Toebelman v. Missouri-Kansas Pipeline Co.**, 130 F. 2d 1016, 1018 (3rd Cir., 1942); **Stevens v. Howard D. Johnson**, 181 F. 2d 390, 394 (4th Cir., 1950); **Bohn Aluminum & Brass Corp. v. Storm King Corp.**, 303 F. 2d 425, 427 (6th Cir., 1962); **Walling v. Fairmount Creamery Company**, 139 F. 2d 318, 322 (8th Cir., 1943).

Petitioner submits that review should be granted in view of the constitutional question of the process of law which has been presented, and in the light of the statutory requirements for hearings as opposed to *ex parte* proceeding by Summary Judgment in unfair labor practice cases.

II.

The Court Below Misapprehended the Proper Standard of Review, Contrary to the Teachings of this Court and Decisions of Other Courts of Appeal.

In the proceedings to set aside the Board's Order, the Court Below treated the standard of review for the substantive election irregularities which were raised as being limited to whether or not the Board had "reasonably exercised its discretion" and had not "abused its discretion" (Appendix D, infra, pp. A-28 and A-29). This treatment does not conform to the substantial evidence concept as to the scope of review, expounded by this Court in **Universal Camera Corporation v. NLRB**, 340 U. S. 474, and has been misapprehended by the Court Below. We submit that the sole standard to be applied where an employer seeks review of a Board finding that it has refused to bargain in violation of Section 8 (a) (5) of the National Labor Relations Act, as amended, or review of any other unfair labor practice finding by the Board, is whether the Board's findings are based upon "substantial evidence in the record considered as a whole" (Section 10 (e), 29 USC, Section 160 (e)). Where substantive election irregularities are asserted, and the unfair labor practice finding is dependent upon the validity of a certification, there is no different standard provided by the statute.

This Court has previously had occasion to remind the Court of Appeals for the Fifth Circuit that there is only one proper standard for the review of all Labor Board cases:

> "There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases. NLRB v. Pittsburgh S. S. Co., 340 U. S. 498, 95 L. ed. 479, 71 S. Ct. 453, and the Universal Camera Corp. Case, both decided the same day, were cases involving reinstate-

ment. They state a rule for review by Courts of Appeals in all Labor cases."

NLRB v. Walton Mfg. Co., 369 U. S. 404, at 407 (1962).

As this Court also reiterated in **Walton**, the reviewing responsibility is that of the Courts of Appeal, but where the standard for review has been "misapprehended or grossly misapplied", this Court will intervene. This is a case where the need for this Court to intervene is clear.

The Court Below, while ultimately stating that the Board's findings and conclusions had support in substantial evidence in the Record, had made it clear that it was not concerned with reviewing the Board's election findings if there was no "abuse of discretion". This contradiction makes the Court's misapprehension of standards obvious. Board findings in election cases must also conform to the substantial evidence test, where those findings are the sole basis for a finding of unlawful refusal to bargain. A Court of Appeals cannot avoid the statutory mandate by holding that the Board's findings are supported by "substantial evidence" if the Board did not "abuse its discretion" in making the findings!

The "abuse of discretion" scope of review concept is necessarily something less in law than the substantial evidence test enunciated by this Court in **Universal Camera.** Indeed, as the Court Below has recognized, there is a "tangled labyrinth of cases touching on what are standards of review for Board determinations in election cases" among the Circuits. **NLRB v. Zanes Ewalt Warehouse, Inc.**, 384 F. 2d 794, 796 (5th Cir., 1967). The extent to which Board certifications are called into question by asserted election irregularities is an important and recurring question of interpretation under the Act. The **Universal Camera** doctrine of this Court establishes only one guidepost for judicial review of Board findings of unfair labor practices; *viz.*, whether the Board's findings are supported by

substantial evidence when viewed on the Record as a whole. **Universal Camera Corporation v. NLRB**, *supra*. Accord: **NLRB v. Walton Mfg. Co.**, 369 U. S. 404 (1962).

The Board's authority in establishing procedures necessary to insure that fair and free choice of bargaining representatives does not diminish the requirement that the Board's findings of unfair labor practices be supported by substantial evidence in the Record considered as a whole. If the Court Below's scope of review concept is the limited one of "abuse of discretion", then in any case where there is **any** evidence upon which the Board's inferences can be supported a fortiori the Board's findings must be upheld. This is reminiscent of the view held by many Courts of Appeal prior to the 1947 Taft-Hartley Amendments which change the rule to one of substantial evidence, a concept discussed and rejected expressly by this Court in **Universal Camera.** See also: **4 Davis Administrative Law Treatise**, Section 29.03 (1958).

The Board's discretionary authority is in establishing election rules. Another Court of Appeals, whose guidelines concerning substantive issues of election misconduct have been adopted by the Board, explains the difference as follows:

> "There is no conflict or contradiction between the substantial evidence rule determinative of the scope of review and the principle whereunder the Board is entrusted with wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives as enunciated in National Labor Relations Board v. A. J. Tower Company, 1946, 329 U. S. 324, 330, 67 S. Ct. 324, 91 L. Ed. 322. These rules do not conflict because they affect differing spheres of activity. The Board's wide discretion lies in the initial promulgation of rules and regulations, while the Court exercises its duties in reviewing decisions involving application of

the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the Record as a whole supports the findings and conclusions respecting compliance with the policies, rules and regulations promulgated by the Board."

Celanese Corporation of America v. NLRB, 291 F. 2d 224, 225 (7th Cir., 1961), cert. den. 368 U. S. 925.

Accord:

"When as here a certification is called in question in connection with a petition to enforce or review an Order of the Board under Section 10, 29 USCA, Section 160, the certification must be sustained insofar as fact questions are concerned, **if the fact findings of the Board made in connection therewith are based** on substantial evidence . . ."

NLRB v. National Plastic Products, Inc., 175 F. 2d 755 (4th Cir., 1949). (Emphasis supplied.)

The "abuse of discretion" concept of the scope of review of Courts of Appeals is not a novel one. It was argued to the Court by the Board in **Celanese,** and was held by the Judges of the Seventh Circuit to be "far from the interpretation placed on the statute by the U. S. Supreme Court in the **Universal Camera** case." Subsequently, the Board urged the Court Below in **NLRB v. Houston Chronicle Publishing Company,** 300 F. 2d 273 (5th Cir., 1962), that its review and evaluation of election propaganda be limited to whether or not the Board acted arbitrarily or capriciously in its determination. In rejecting the concept at that time, the Court Below ruled that "in determining whether the Board properly evaluated campaign propaganda, we accept the Board's findings of fact, **so long as they are supported by substantial evidence on the Record considered as a whole.** This is the test prescribed by 29 USCA, Section 160 (e), and **Universal Cam-**

era Corporation v. NLRB, 340 U. S. 474, 71 S. Ct. 456, 95 L. ed. 456 (1952)." *Supra,* at 277.

Guidance by this Court as to the scope of judicial review of Board determinations in election cases is needed where substantive issues are raised. In the absence of such clarification, injustice is likely to result in proceedings before the Board and the Courts of Appeals. While the standards enunciated by this Court in **Universal Camera** and **Walton** are generally applied, e. g., **Celanese Corporation of America v. NLRB**, 291 F. 2d 224 (7th Cir., 1961), **cert. den.** 368 U. S. 925, in the Fifth Circuit, depending upon the Panel hearing such case, the standard of review may be one of whether or not the Board acted "arbitrarily or capriciously", **Manning, Maxwell, and Moore, Inc. v. NLRB**, 324 F. 2d 857 (5th Cir., 1963); the "standard of reasonableness test", **Neuhoff Brothers Packers, Inc. v. NLRB**, 362 F. 2d 611 (5th Cir., 1966) or "substantial evidence", **NLRB v. Houston Chronicle Publishing Company**, 300 F. 2d 273 (5th Cir., 1962). The need for review of the Decision of the Court Below parallels the need shown in **NLRB v. Walton Mfg. Co.**, 369 U. S. 404 (1962).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

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APPENDIX.

APPENDIX.

APPENDIX A.

STATUTES.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Representatives and Elections.

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

(c) (1) Where a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Prevention of Unfair Labor Practices.

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and

to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action * * * as will effectuate the policies of this Act: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties * * * such recommended order shall become

the order of the Board and become effective as therein prescribed.

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Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discre-

tion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act: . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. . . . In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties . . . such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate

temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon

the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX B.

166 NLRB No. 24

D-25

Lindale, Ga.

United States of America
Before the National Labor Relations Board.

Pepperell Manufacturing Company and Textile Workers Union of America, AFL-CIO, CLC.	Case No. 10-CA-6819.

DECISION AND ORDER.

On May 9, 1967, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the entire record in this case, including the record and decisions in Case No. 10-RC-6214, the Trial Examiner's Decision, and Respondent's exceptions, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

Order.

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner and orders that Pepperell Manufacturing Company, Lindale, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[1]

Dated, Washington, D. C., June 28, 1967.

JOHN H. FANNING, Member,
GERALD A. BROWN, Member,
SAM ZAGORIA, Member,
(Seal) NATIONAL LABOR RELATIONS BOARD.

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[1] The address and telephone number for Region 10, appearing at the bottom of the Notice attached to the Trial Examiner's Decision, is amended to read: 730 Peachtree St., N. E., Rm. 701, Atlanta, Georgia 30308, Tel. No. 526-5741.

TXD-258-67

Lindale, Ga.

United States of America
Before the National Labor Relations Board
Division of Trial Examiners,
Washington, D. C.

Pepperell Manufacturing Company and Textile Workers Union of America, AFL-CIO, CLC.	Case No. 10-CA-6819.

Stephen D. Hise, Esq., for the General Counsel.

Lovic A. Brooks, Jr., Esq. (Constangy & Prowell), Atlanta, Ga., for the Respondent.

Daniel Jordan, Esq., New York, N. Y., for the Union.

Trial Examiner's Decision.

Statement of the Case.

The Representation Proceeding.[1]

Charles W. Schneider, Trial Examiner: Upon petition for certification as collective-bargaining representative filed by Textile Works Union of America, AFL-CIO, CLC, herein called the Union, the Regional Director for Region 10 of the Board on February 16, 1965, approved a Stipulation for Certification Upon Consent Election executed by Pepperell Manufacturing Company, Lindale, Georgia, herein called the Respondent, and by the Union. The appropriate bargaining unit was stipulated to be the unit set out hereinafter.

[1] Official notice is taken of the representation proceeding, Case No. 10-RC-6214. See Section 9 (d) of the National Labor Relations Act.

An election pursuant to the stipulation was held on March 5, 1965, which the Union lost. Upon objections to the conduct of the election filed by the Union, and after hearing thereon, and over the opposition of the Respondent, the election was set aside by the Board on June 13, 1966 and a second election directed.[2] Pursuant thereto, a second election by secret ballot was conducted on August 4, 1966, under the direction and supervision of said Regional Director, in which election the Union received a majority of the valid votes cast. The Respondent filed timely objections to the election, in which it requested that the March 5, 1965 election be certified as expressing the true wishes of the employees, or in the alternative that the August 1966 election be set aside and a new election directed, and that in the event of dispute a hearing be held to resolve any substantial issues raised. On September 16, 1966, the Regional Director, after investigation, issued a Report on Objections in which he found the Respondent's objections without merit, and recommended that they be overruled and that the Union be certified as bargaining representative of the employees involved. Thereafter the Respondent filed timely exceptions to the Regional Director's Report on Objections. On January 4, 1967, the Board issued its Decision and Certification of Representative in which it found no "sufficient warrant for setting aside the election." Accordingly, the Board adopted the Regional Director's report and certified the Union as the bargaining representative under the Act.

The Complaint Case.

On January 13, 1967, the Union filed the unfair labor practice charge involved in the instant case, in which it alleged that since on or about January 10, 1967, the Respondent had refused to bargain with the Union.

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[2] **Pepperell Manufacturing Company**, 159 NLRB No. 9.

On February 23, 1967, the General Counsel, by the Regional Director of Region 10, issued a complaint alleging that the Respondent had committed unfair labor practices in violation of Section 8 (a) (5) and (1) and Section 2 (6) and (7) of the Act by refusing to bargain with the Union upon request. In due course the Respondent filed its answer to the complaint in which certain allegations of the complaint were admitted and others denied.

In its answer the Respondent admits the following allegations of the complaint: (1) Jurisdictional, (2) that the Union is a labor organization, and (3) that the unit is appropriate. Respondent denies the allegations contained in paragraphs 7, 8, 9, 10, and 11, of the complaint wherein it is alleged that (1) the employees designated and selected the Union in the August 4, 1966 election as their bargaining representative, (2) the Board certified the Union, (3) the Union has been and is the representative of a majority of the employees in the appropriate unit, (4) the Union requested Respondent on or about January 10, 1967 to bargain collectively and (5) the Respondent on or about that date and thereafter refused and continues to refuse to bargain collectively. Respondent further denied each and every allegation contained in paragraph 12 of the complaint, wherein it is alleged that Respondent committed unfair labor practices.

In its answer, Respondent further alleges that the Board improperly and unlawfully set aside the election of March 5, 1965, in which a majority of the employees voted against the Union, that it improperly conducted a second election, and that it failed to provide Respondent with a hearing based on its filing of timely objections to the second election.

On March 21, 1967, Counsel for the General Counsel filed a Motion for Summary Judgment wherein he con-

tends that the facts of the official record and other facts submitted with the motion establish the allegations of the complaint as a matter of law, and that therefore there is no necessity for a hearing.

On March 24, 1967, I issued an Order to Show Cause on the Motion for Summary Judgment, in which the parties were directed to show cause on or before April 10, 1967, subsequently extended to April 24, as to whether or not the Motion for Summary Judgment should be granted. The Respondent has filed a response to the motion.

Ruling on Motion for Summary Judgment.

The Respondent opposes the General Counsel's Motion for Summary Judgment. The Respondent contends that the March 1965 election, which the Union lost, was erroneously set aside, and that the August 1966 election should have been nullified on the basis of the Respondent's objections, and that the certification is consequently invalid. Additionally the Respondent contends that it was improperly deprived of a hearing on its objections to the August 1966 election, and urges that its answer to the complaint raises substantial and material issues of fact which cannot be resolved without a hearing.

It has been seen that the questions as to the validity of the two elections, the merit of the Respondent's contentions with respect to each, and whether the Union should be certified, were raised before and decided by the Board in the representation proceeding. It is thus clear that the Respondent seeks to re-litigate those issues here.

This the Respondent may not do before the Trial Examiner. It is established Board policy, in the absence of newly discovered or previously unavailable evidence, not to permit litigation before a Trial Examiner in a complaint case of issues which were or could have been liti-

gated in a prior related representation proceeding.[3] This policy is applicable even though no formal hearing on objections has been provided by the Board. Such a hearing is not a matter of right unless substantial and material issues are raised.[4] And that there are not such issues has been effectively decided by the Board.

The Trial Examiner has no authority to review the Board's final dispositions of the representation issues or to question its conclusions made on the existing record. The Respondent is free, in exceptions to this Decision, to request the Board to reconsider the determinations in the representation case, and, in the event of an unfavorable final order by the Board the Respondent may request review of the determinations in an appropriate court of appeals. At this stage of the proceedings, however, absent newly discovered evidence, the Board's disposition of the representation matters is the law of the case and binding on the Trial Examiner. No newly discovered or previously unavailable evidence is offered by the Respondent.

The refusal to bargain being established, as is hereinafter found, there are no issues litigable before a Trial Examiner, and therefore no matter requiring hearing. Accordingly, the General Counsel's motion for summary judgment is granted, and I hereby make the following further:

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[3] **Collins & Aikman Corp.**, 160 NLRB No. 135; **E-Z Davies Chevrolet**, 161 NLRB No. 121; **Metropolitan Life Insurance Company**, 163 NLRB No. 71. See **Pittsburgh Plate Glass Co. v. N. L. R. B.**, 313 U. S. 146, 162.

[4] **O. K. Van and Storage, Inc.**, 127 NLRB 1537, 297 F. 2d 74 (C. A. 5). And see **Air Control Window Products, Inc.**, 335 F. 2d 245, 249 (C. A. 5): "If there is nothing to hear, then a hearing is a senseless and useless formality." **Cf. U. S. Rubber Co.**, 64 LRRM 2393 (C. A. 5), where the Court disagreed with the Board's conclusion that the objections raised no issues requiring hearing. The Court is authorized to reverse the Board's conclusions if it deems them incorrect. The Trial Examiner is not.

Findings.

I. The Business of the Respondent.

Respondent is a Massachusetts corporation with an office and place of business in Lindale, Georgia, where it is engaged in the manufacture and sale of textile products. During the year ending February 23, 1967, a representative period, Respondent sold and shipped products valued in excess of $50,000 from its plant at Lindale, Georgia, directly to customers located outside the State of Georgia. The Respondent is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The Labor Organization Involved.

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices.

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

> All production and maintenance employees of the Respondent at its Lindale, Georgia, plant, including all plant clerical employees, but excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

On August 4, 1966, a majority of Respondent's employees in the said unit selected the Union as their collective-bargaining representative in a secret-ballot election conducted under the supervision of the Regional Director for Region 10 of the National Labor Relations Board in Case No. 10-RC-6214.

On January 4, 1967, the National Labor Relations Board, after consideration of Respondent's objections to the

above-described election, certified the Union as the exclusive collective-bargaining agent of the employees in the said unit.

At all times since on or about January 4, 1967, and continuously to the present, the Union has been the representative for the purpose of collective bargaining of the employees in the said unit, and, by virtue of Section 9 (a) of the Act, has been and is now the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Under date of January 10, 1967, James Shea, International Representative of the Union, wrote to G. Howard Smith, General Manager of the Respondent, requesting a meeting for the purpose of negotiations concerning the certified unit. There is no indication of any direct reply by the Respondent. However, on January 17, 1967 the Respondent posted a notice to employees on its bulletin board, in which it acknowledged receipt of the Union's letter but stated its intention to seek court review of the validity of the certification.

By this action the Respondent failed and refused to bargain collectively with the Union in violation of Section 8 (a) (5) of the Act and interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

In order to insure that the employees will be accorded the statutorily prescribed services of their selected bargaining agent for the period provided by law, it will be recommended that the effective period of the certification shall begin on the date the Respondent commences to bar-

gain in good faith with the Union as the recognized bargaining representative in the appropriate unit.[5]

Upon the foregoing findings and conclusions and the entire record in the case, I recommend that the Board issue the following:

Order.

A. The effective period of the certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.

B. Pepperell Manufacturing Company, Lindale, Georgia, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Textile Workers Union of America, AFL-CIO, CLC, as the exclusive collective bargaining representative of the employees in the following appropriate bargaining unit:

> All production and maintenance employees of the Respondent at its Lindale, Georgia, plant, including all plant clerical employees, but excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent the employees in said appropriate unit as the exclusive collective bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request, bargain collectively with Textile Workers Union of America, AFL-CIO, CLC, as the exclu-

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[5] **Mar-Jac Poultry Company, Inc.**, 136 NLRB 785; **Commerce Co. d/b/a Lamar Hotel**, 140 NLRB 226, 229, 328 F. 2d 600 (1964, C. A. 5); **Burnett Construction Co.**, 149 NLRB 1419, 1421, 350 F. 2d 57 (1965, C. A. 10).

sive representative of the employees in the appropriate unit described above, with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Lindale, Georgia, plant copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms to be furnished by the Regional Director for Region 10, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from receipt of this Recommended Order, what steps it has taken to comply herewith.[7]

Dated at Washington, D. C.

/s/ CHARLES W. SCHNEIDER,
CHARLES W. SCHNEIDER,
Trial Examiner.

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[6] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[7] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 10, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX.

Notice to All Employees

Pursuant to
the Recommended Order of a Trial Examiner of the
National Labor Relations Board
and in order to effectuate the policies of the
National Labor Relations Act.

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, CLC, as the exclusive bargaining representative of the following employees:

All production and maintenance employees at our Lindale, Georgia, plant, including all plant clerical employees, but excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

WE WILL NOT interfere with the efforts of said Union to negotiate for or represent the employees in said appropriate unit as the exclusive collective-bargaining representative.

WE WILL bargain collectively with the Union as the exclusive representative of the employees, and if an understanding is reached we will sign a contract with the Union.

PEPPERELL MANUFACTURING COMPANY.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 528 Peachtree-Seventh Building, 50 Seventh Street, N. E., Atlanta, Georgia, 30323 (Tel. No. 526-5741).

APPENDIX C.

In the United States Court of Appeals
for the Fifth Circuit.

Pepperell Manufacturing Company,
Petitioner,

v.

National Labor Relations Board,
Respondent.

Petition for Review of Order of the National Labor Relations Board in Case No. 10-CA-6819.

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

Now comes Pepperell Manufacturing Company, a corporation, incorporated under the laws of the State of Massachusetts, maintaining an office and place of business at Lindale, Georgia, where it is engaged in the manufacture, sale and distribution of textile products. Petitioner respectfully petitions this Court to review and set aside an Order of the National Labor Relations Board in a proceeding entitled **Pepperell Manufacturing Company and Textile Workers Union of America, AFL-CIO, CLC**, being known as Case No. 10-CA-6819, involving the Petitioner's plant at Lindale, Georgia.

This Petition is filed pursuant to Section 10 (f) of the National Labor Relations Act, 29 U. S. Code Section 160 (f), and in accordance with Rule 38 of the Rules of this Court.

1.

Petitioner shows that it is engaged in business in Lindale, in the State of Georgia, in this Judicial Circuit. The

charging party in the above referenced Case No. 10-CA-6819 is the Textile Workers Union of America, AFL-CIO, CLC, hereinafter referred to as the Union, which maintains an office and place of business in Rome, in the State of Georgia. This Court has jurisdiction by virtue of Section 10 (f) of the National Labor Relations Act, as amended.

2.

Petitioner shows that by virtue of charges filed with the National Labor Relations Board on January 13, 1967, a Complaint and Notice of Hearing was issued against the Petitioner by the Regional Director of the National Labor Relations Board on February 23, 1967. Thereafter, on March 22, 1967, said Regional Director for the National Labor Relations Board did issue an Order indefinitely postponing the hearing previously scheduled by his Complaint and Notice of Hearing issued on February 23, 1967. Further, Petitioner shows that on March 21, 1967, Counsel for the General Counsel of the National Labor Relations Board filed a Motion for Summary Judgment with the Trial Examiner for the National Labor Relations Board requesting that the Trial Examiner, without a hearing and without taking oral testimony, make findings of fact and conclusions of law finding that Petitioner had violated Sections 8 (a) (1) and (5) of the Act, and further, requesting that he issue an Order providing that Petitioner recognize and bargain with the Union. On March 24, 1967, the Trial Examiner for the National Labor Relations Board issued an Order to Show Cause on Counsel for the General Counsel's Motion for Summary Judgment, to which Petitioner filed a timely response. Petitioner shows that subsequently said Trial Examiner issued his Decision dated May 9, 1967, granting General Counsel's Motion for Summary Judgment and finding that Petitioner had violated Sections 8 (a) (1) and (5) of the National Labor Relations Act, as amended, and

recommended that the Board issue an Order requiring Petitioner to recognize and bargain with the Union as the collective bargaining representative of certain of Petitioner's employees. Thereafter, Petitioner filed timely Exceptions with the National Labor Relations Board excepting to the Decision of the Trial Examiner granting General Counsel's Motion for Summary Judgment and further excepting to the Recommended Order of the Trial Examiner requiring Petitioner to recognize and bargain with the Union. Thereafter, the National Labor Relations Board issued an Order substantially adopting the Trial Examiner's findings, conclusions and recommendations and requiring that Petitioner recognize and bargain with the Union.

3.

Petitioner shows that it is aggrieved by the aforesaid Decision and Order of the National Labor Relations Board and that said Decision and Order is contrary to the evidence, contrary to law and in contravention of the provisions of the National Labor Relations Act, as amended.

Wherefore, Petitioner prays:

A. That this Petition for Review of Order by the National Labor Relations Board in Case No. 10-CA-6819 be filed by the Court and that it cause a notice of the filing of this Petition to be served upon Respondent;

B. That the Court direct the National Labor Relations Board, in accordance with the Rules of this Court, to file a copy of all documents, exhibits and other material comprising the Record in the above referenced proceeding before the National Labor Relations Board and certify same; and

C. That the Court take jurisdiction of the proceedings and the questions to be determined therein and make

and enter upon the pleadings and the evidence in the Record a Decree setting aside and vacating the National Labor Relations Board Decision and Order insofar as it holds or finds that Petitioner violated the National Labor Relations Act in any particular and insofar as it directs that Petitioner take any affirmative or other action in accordance therewith.

Respectfully submitted,

PEPPERELL MANUFACTURING COMPANY,

By FRANK A. CONSTANGY,
Of Counsel.

CONSTANGY & PROWELL,
1900 Peachtree Center Bldg.,
Atlanta, Georgia 30303,
Counsel for Petitioner.

APPENDIX D.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 24955.

Pepperell Manufacturing Company,
Petitioner,

versus

National Labor Relations Board,
Respondent.

Petition for Review of an Order of the National Labor Relations Board (Georgia Case)

(November 13, 1968)

Before Bell and Morgan, Circuit Judges, and Guinn, District Judge.

Morgan, Circuit Judge: This is a petition to review and a cross-petition to enforce an order of the National Labor Relations Board requiring the Pepperell Manufacturing Company located at Lindale, Georgia, to recognize and bargain with the union, Textile Workers of America. This appeal involves a review of the Board's decision as to two elections in the Pepperell Lindale plant. The issue arises in the context of a violation of Section 8(a)(5)

and (1) of the National Labor Relations Act[1] in refusal to bargain. The Board set aside the first election which the Union had lost and upheld the second election which the Union had won. The petitioner, Pepperell Lindale, maintains that the Board erred in each instance.

On March 8, 1965, a Board election was held at Pepperell's plant in Lindale, Georgia. Of approximately 2,257 eligible voters, 959 voted for the Textile Workers Union of America and 1,155 voted against the Union. On March 12, 1965, the Union filed objections to the election with the Board. Following an investigation, the Regional Director found that union allegations of Pepperell threats of plant shutdown, layoffs, and refusal to sign agreement with the Union raised credibility issues which might best be resolved by recorded testimony at a hearing. At the hearing, held on September 1, 1965, evidence was presented by opposing parties.

From the hearing the following evidence was adduced by the Hearing Officer. About a week before the election, Supervisor Ned Johnson, referring to an Alabama textile mill which had closed down, told a group of employees, "See what happened at this mill, now if the Union comes in, this could happen to us." Johnson also admittedly spoke of the possibility of a plant shutdown to each of the 15 to 18 men he supervised. Supervisor Edward Wood told a group of employees a few days before the election, "These people don't know what they're getting into. If the Union comes in, the Company will start moving the machinery out." Wood admittedly discussed with each of the 30 men under his supervision the management rights clause contained in another company's contract and told them that if the Union should come in, Pepperell would sign a contract similar to this one which reserved the right to close and move the machinery out. Finally, evidence was introduced to prove that the night

[1] 29 U. S. C. 158 (a) (1) and (5).

before the election, Supervisor Haden Smith approached an employee, Joe Lewis, and told him not to vote for the Union because if the Union came in, the Company would close down the plant, take out the machines and ship them somewhere else. The Company also engaged in an intensive electioneering campaign, with materials posted on bulletin boards, as well as speeches and leaflets. A major emphasis was on plant closings following unionization.

On June 13, 1966, the Board ordered that the first election be set aside, affirming the Hearing Officer's findings of threats and adding that "we also rely on the overall impact of such conduct when viewed in the light of the Employer's antiunion campaign, . . ., emphasizing the inevitability of a strike and the certainty of economic loss to the employees if they chose Petitioner as their collective-bargaining representative." The Regional Director scheduled a second election.

The second election was held on August 4, 1966, and 1,139 voted for the Union and 917 against. Pepperell objected to this election on the grounds that the Union had distributed a newspaper article and leaflets which made material misrepresentations to which the Pepperell Manufacturing Company had no opportunity to reply, and which affected the election outcome. The newspaper advertisement was published on July 31, 1966, in the *Rome News Tribune* which is widely read by the employees of Pepperell. The message of this ad was reprinted in a leaflet which was distributed by the Union to the Pepperell employees on August 3, 1966, the day before the election. These misrepresentations concerned wages in surrounding union companies and were as follows:

Company	*Alleged Rate*	*Actual Rate*
G. E.	$3.21	$2.91
Kraft	3.10	2.86
Inland Container	2.75	2.54

The Regional Director recommended that the Board overrule Pepperell's objections on the grounds that even assuming the figures used by the Union were inaccurate, they were either *de minimis* or Pepperell had adequate time to reply. The Board agreed with the Regional Director and certified the Union as the exclusive bargaining representative.

About January 10, 1967, the Union requested recognition on the basis of its certification. Upon Pepperell's refusal, a Section 8(a)(5) charge was filed and a complaint was issued. Pepperell in its answer, denied any violation of Section 8(a)(5) of the National Labor Relations Act. The Trial Examiner granted a motion for summary judgment in favor of the Union. The Board adopted the Trial Examiner's decision and recommended order, finding Pepperell in violation of Section 8(a)(5) and (1) of the National Labor Relations Act. The order requires Pepperell to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to post appropriate notices. It is from this order Pepperell appeals.

The Board has wide discretion in its conduct and supervision of elections. Determination whether union representation election was fairly or unfairly conducted and should be set aside is primarily for the National Labor Relations Board. Thus, the only question presented to the Courts in an election review is whether the Board has reasonably exercised its discretion. *Neuhoff Bros. Packers, Inc.* v. *N. L. R. B.*, 362 F. 2d 611 (5 Cir., 1967).

As to the issue of the invalidation of the first election, we are in accord with the order of the Board. One prime thrust of Pepperell's campaign was that selecting the Union meant a plant shutdown and consequent economic disaster. Against this background, the employees had, as the dominant affirmative statement as to what Pepperell

would do, the statements of three supervisors to the 50-odd employees under them that the plant would be closed down.

Judicial review of the conduct of consent elections is limited to ascertaining whether the Board's determination is within reasonable bounds. *N. L. R. B.* v. *Laney & Duke Storage Warehouse Co.*, 369 F. 2d 859 (5 Cir., 1966); *N. L. R. B.* v. *Houston Chronicle Publishing Co.*, 300 F. 2d 273 (5 Cir., 1962). On the record, the Board concluded that the threats, coupled with the literature described, impaired the freedom of the employees to make an unfettered choice and set the election aside as not truly representing the untrammeled will of the Pepperell employees. Our duty is to determine if this conclusion is reasonably drawn from the circumstances surrounding the election. In a careful review of the record, we conclude that the Board has not abused its discretion, and the first election was properly set aside.

Pepperell filed objections to the second election contending that the Union campaign propaganda was a material misrepresentation to which it did not have adequate time to reply. In *Anchor Manufacturing Co.* v. *N. L. R. B.*, 300 F. 2d 301 (5 Cir., 1962), this Court found the basic issue in cases such as this to be "whether such false statements as may have been made *in fact* constituted an interference with a free choice of bargaining representatives; it is obvious that every false statement does not." The Board contends that the message which the Union sought to advance was that the textile industry was lagging behind other unionized industries as to wage rates. With this as the central message and the Pepperell employees receiving an average of $1.80 an hour, the Board found the 20- to 30-cents discrepancies listed above as not in fact constituting any real interference.

The Court, in discussing the area of misrepresentation during elections campaigns has adopted three criteria

used by the Board: (1) Is the misrepresentation of a material fact? (2) Did the misrepresentation come from a party who has special knowledge of the true facts? and (3) Did the opposing party have sufficient opportunity to correct the misrepresentation? *Anchor Manufacturing Company* v. *N. L. R. B.*, supra. Other courts have approved these criteria. *N. L. R. B.* v. *Allen Manufacturing Co.*, 364 F. 2d 814 (6 Cir., 1966); *United Steelworkers of America* v. *N. L. R. B.*, 393 F. 2d 661 (7 Cir., 1968). In application of the facts of this case to the standards recited, we fail to recognize any interference resulting from the misstatements. In examining these misrepresentations, this Court has recognized that the true principle "is not that when false statements are made they constitute an interference with free choice, but that when false statements are made which constitute an interference with free choice . . . an election should be set aside." *Anchor Manufacturing Co.* v. *N. L. R. B.*, supra. Since the handout leaflet was the same as the Sunday newspaper advertisement and the Company had ample time to answer the newspaper article, we conclude that Pepperell has failed to establish the requisite unfairness in the conduct of the election.

The findings and conclusions of the Board having support in substantial evidence on the record considered as a whole, Pepperell's petition is denied. The cross-petition for enforcement is granted.

Order Enforced.

APPENDIX E.

(Letterhead of United States Court of Appeals,
New Orleans, La.)

January 29, 1969

Mr. Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
Washington, D. C.

Re: No. 24955—Pepperell Manufacturing Company v. N. L. R. B.
(Your No. 10-CA-6819)

Dear Sir:

Enclosed is a certified copy of the judgment in the referenced cause, issued as and for the mandate.

Returned herewith is record on review, volumes I, II and III, in this case.

Please acknowledge receipt.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk,
By JACKIE ESPOSITO,
Deputy Clerk.

/je

Encls.

cc and copy of judgment:
Mr. Frank A. Constangy
Mr. Walter C. Phillips

United States Court of Appeals
For the Fifth Circuit.

Pepperell Manufacturing Company,
Petitioner,
v.
National Labor Relations Board,
Respondent.
No. 24955.

Judgment.

Before: Bell and Morgan, Circuit Judges, and Guinn, District Judge.

By the Court:

This Cause came on to be heard upon a petition to review an Order of the National Labor Relations Board, dated June 28, 1967, issued against petitioner and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on October 14, 1968, and has considered the briefs and transcript of record filed in this cause. On November 13, 1968, the Court being fully advised in the premises handed down its opinion granting enforcement of the Board's said order.

On Consideration Whereof, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Pepperell Manufacturing Company, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

Entered: Dec. 2, 1968.

A true copy

Attest: EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals, Fifth Circuit,
By JACQUELYN ESPOSITO, Deputy,
New Orleans, Louisiana.

Jan. 29, 1969.

APPENDIX F.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 24,955.

PEPPERELL MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

FRANK A. CONSTANGY,
CONSTANGY & PROWELL,
1900 Peachtree Center Building,
Atlanta, Georgia 30303,
Counsel for Petitioner, Pepperell Manufacturing Company.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 24,955.

PEPPERELL MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

Now Comes Pepperell Manufacturing Company, the Petitioner in the above matter (hereinafter called the "Company") and files this, its Petition for Rehearing of the Court's Decision issued November 13, 1968, wherein the Court denied the Company's Petition to Set Aside the Order of the National Labor Relations Board (hereinafter called the "Board") and granted the Board's Cross-Petition for Enforcement of its Decision in the above matter, and for grounds thereof, shows:

I.

The Decision of the Court in the instant matter, which has overlooked or misapprehended the failure of the Board to provide a hearing on material factual issues raised in objections to representation elections, constitutes a deprivation of constitutional due process of law to the Company. The Court's Decision was based upon erroneous factual and legal assumptions. The Court treated the case as one in which the Board's findings had been established by substantial evidence in the Record as a whole following a hearing, when as a matter of fact the Board's findings were *ex parte* determinations contrary to the only sworn evidence in the Record. Such sworn evidence by the Company made out a *prima facie* case in support of its objections to the second election. Unless said evidence is treated in the light most favorable to the Company, a treatment which was not given it by the Board or the Court, then the Company, as a matter of law, was entitled to hearing as set forth in its Response to the Motion for Summary Judgment (TR. 140-143). The failure of the Court here to remand for a hearing in the light of its treatment of the undisputed evidence in support of Company objections to the second election is completely inconsistent with previous and concurrent Decisions by other panels of this Court in the following cases:

NLRB v. Smith Industries, Inc., No. 25,691, decided by this Court on November 12, 1968 (Goldberg and Ainsworth, Circuit Judges, and Spears, District Judge);

Howell Refining Company v. NLRB, 400 F. 2d 213 (1968) (Rives, Gewin and Thornberry, Circuit Judges);

NLRB v. Ortronix, Inc., 380 F. 2d 737 (1967), rehearing and rehearing en banc (Gewin and Ainsworth, Circuit Judges, and Lynne, District Judge);

Home Town Foods, Inc. v. NLRB, 379 F. 2d 241 (1967) (Coleman and Ainsworth, Circuit Judges, and Carswell, District Judge);

United States Rubber Company v. NLRB, 373 F. 2d 602 (1967) (Wisdom, Coleman, and Godbold, Circuit Judges).

The record establishes that the Company at no point has been afforded the opportunity of a hearing on its objections to the second election, which raised substantial and material factual issues and were supported by substantial evidence, making out a *prima facie* case as to the validity of those objections, or a hearing on issues which the Board considered determinative in the first election. The issues raised by the Company in both elections presented not only questions of fact, but questions of what this Court has termed "adjudicative facts" which involved, in language cited with approval by this Court, ". . . who did what, where, when, how, why, with what motive or intent . . ." **(NLRB v. Smith Industries, Inc.**, 5th Cir., No. 25,691, decided November 12, 1968.)[1]

It is pointed out as undisputed fact, in the absence of a hearing, that the only evidence before the Board in the Summary Judgment proceeding before it following the second election, was the undisputed affidavits of the Company's Assistant Plant Manager Horsley (TR. 139; 152; 158). The criteria[2] adopted by this Court and the

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[1] The Court in the **Smith** case also pointed out that a grant of Summary Judgment is not proper even where the "historic facts" are free from controversy: **"It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under these circumstances, the case is not one to be decided on motion for summary judgment."** (Cited cases omitted.) **NLRB v. Smith Industries, Inc.**, *supra* (Emphasis supplied).

[2] The Court, following the decision of the Seventh Circuit in **Celanese Corporation of America v. NLRB**, 291 F. 2d 224 (7th Cir., 1961), has adopted the three criteria used by the Board: (1) Is the misrepresentation of a material fact? (2) Did the mis-

Board concerning misrepresentations during union election campaigns which result in election interference are clearly fulfilled here.

The Board in its decision, certifying the Union without affording a hearing, characterized union propaganda as "alleged misrepresentations" and assumed their materiality[3] but refused to set aside the election as a result thereof by finding that (1) there was ample time to reply and (2) the information was not within the special knowledge of the union. See:

> ". . . With respect to Employer's objection 5, concerning, in part, certain alleged misrepresentations of wage rates of union employees in the immediate locality of the plant herein involved, we note that the said information was first disseminated on July 31, 1966, and was merely repeated on August 3. Thus, there was ample time for an Employer reply before the election, which was conducted on August 4, 1966. Further, the wage information was not such as fell within the special knowledge of the Petitioner."
>
> **TR. 112-113.**

The affidavit of Horsley clearly shows that the misrepresentations were material; that they came from those "who clearly had superior knowledge sufficient to inspire the reliance of the employees;"[4] and that there was no ample opportunity to reply (TR. 152-158):

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representation come from a party who has special knowledge of the true facts? and (3) Did the opposing party have sufficient opportunity to correct the misrepresentation? (See pages 6-7 of Decision).

[3] "The union would not have made such statements if it had not believed that they would be material in influencing the vote." **Celanese Corporation of America v. NLRB**, 291 F. 2d 224, at 226 (7th Cir., 1961).

[4] **NLRB v. Houston Chronicle Publishing Co.**, 300 F. 2d 273, 279 (5th Cir., 1962).

(a) The publication of the newspaper article containing the misstatements as to wages by other unions in the area did not create interest or "appreciable conversation" at the plant, but that the distribution of the leaflet by the Petitioning Union on the Wednesday preceding the Thursday election created "much conversation" in the plant (TR. 153);

(b) The ad and leaflet were signed by the official representatives of the unions who allegedly had obtained in the contracts they had negotiated in the Rome area the rates which were misrepresented, and both were sponsored and distributed by the Petitioning Union in this matter (TR. 152-153);

(c) The Company did not have ample opportunity to obtain the correct facts prior to the election on Thursday. The newspaper ad appeared on Sunday (purportedly published in the names of the other unions) and the leaflet was distributed on Wednesday by the Petitioning Union. With one exception, the Company was unable to determine the truth or falsity of the wage assertions until after the Thursday election, and as a consequence could not answer the misrepresentations prior to the election (TR. 154).[5]

The Company pointed out in its Exceptions to the Regional Director's Report on its Objections to the second election, that it had not had an opportunity to be heard

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[5] In **NLRB v. Trinity Steel Company,** 214 F. 2d 120 (1954), the Board made a similar unsubstantiated finding. This Court said: ". . . the Board clearly erred in overruling respondent's objections on the principal and unsubstantial ground that the respondent was privileged to answer Cook's statement 'in a reasonable manner if it so desires.' **The entire record of the case is to the contrary and to the effect that the first information the executives of the company had of the misrepresentations in question was after the election had been held . . .**" (Emphasis added). *Supra* at page 123. See also **Collins & Aikman v. NLRB,** 383 F. 2d 722 (4th Cir., 1967).

on its Objections (TR. 100-101); that there were disputed questions of material fact (TR. 105-107). The Board did not respond and certified the Union without granting a hearing. The Company refused to bargain and Summary Judgment proceedings were initiated by the Board.

The Company pointed out in its Answer to the Complaint (TR. 124) and in response to the Board's General Counsel's Motion for Summary Judgment (TR. 140-151) that it had not had a hearing and again sought an opportunity to be heard. It furnished further evidence contradicting the Regional Director's *ex parte* finding that the misrepresentations (which the Regional Director acknowledged were misrepresentations) did, in fact, have a substantial impact on the election; it contradicted by affidavit the Board's *ex parte* finding that the misrepresentations were not made by parties who had special knowledge of the true facts; and it contradicted by affidavit the Board's finding that the Company had sufficient opportunity to correct the misrepresentations. The Company's Answer and Response pointed out these and other unresolved factual issues (TR. 143-149), and again requested that the matter be set for hearing, rather than be decided by Summary Judgment (TR. 151). This request was denied (TR. 181-183).

The posture of the case before the panel of the Court which heard this matter was in keeping with this Court's decision in **Neuhoff Brothers Packers, Inc. v. NLRB**, 362 F. 2d 611, 613 (1966). That decision and those of other courts make it plain that where there is a request for summary judgment, the facts submitted by the party opposing summary judgment (in this case the undisputed affidavit of Horsley being the only facts before the Trial Examiner and the Board) are to be construed in the light most favorable to the party opposing summary judgment; otherwise, a summary judgment proceeding without a

hearing cannot be supported.[6] This is consistent with the unbroken line of decisions of this Court referred to in the **Smith** case, *supra*, which was decided the day before the instant matter; the **Howell Refining** case, which was decided August 12, 1968; the **Ortronix** case, which was decided July 11, 1967; the **Home Town Foods** case, which was decided June 26, 1967; and the **United States Rubber** case, which was decided February 20, 1967 —all by panels of this Court.

The Court obviously did not treat the undisputed evidence in Horsley's affidavit, which was the only evidence before the Trial Examiner, in the words of Chief Judge Tuttle, ". . . most strongly from the standpoint of the Company . . ." **(Neuhoff Brothers,** *supra*, at Page 613). Having failed to do so, the Court's affirmation of the Board's decision, in the absence of an opportunity of the Company to be heard on the factual issues raised by its Objections, is a denial of due process as defined by this Court both in Labor Board cases and in other cases[7] involving the grant of summary judgment on pleadings

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[6] In **Sonoco Products Company v. NLRB,** 399 F. 2d 835 (9th Cir., 1968), copy of which decision was handed up to the Court by Board Counsel at the oral argument, the Court, following this Court's decision in **Home Town Foods,** *supra*, found that a hearing on the "totality of circumstances" was required, and went on to say:

> ". . . Petitioner has raised a substantial and material factual issue as to whether, in combination, **all of the circumstances** on which it relies presented a fair election. Therefore we conclude that unless the Board assumes the truth of (plant manager) Hughes' allegations regarding Gonzales' conduct and status as a union agent it must grant a hearing with respect to those issues" (Emphasis original). **At page 843.**

[7] *e. g.*, **Palmer v. Chamberlin,** 191 F. 2d 532, 540 (5th Cir., 1951):

> ". . . the Court should refuse to grant a motion for summary judgment until the facts and circumstances have been sufficiently developed to enable the Court to be reasonably certain that it is making a correct determination of the question of law."

and affidavits, and is an unconstitutional deprival of due process, as defined by this Court in its well-reasoned **Smith Industries** decision, *supra.*

II.

The Court in its Decision made assumptions which were contrary to the Record and erroneous as a matter of law:

(a) The Court assumed (Page 5 of the Decision) that these were "consent elections". The Record shows they were elections by "Stipulation" (TR. 19-23). The distinction is that in a "consent" election, the parties agree that election objections will be determined finally by the Board's Regional Director. 29 CFR, Section 102.62 (a). This Court has ruled that such elections will not be set aside where the Regional Director did not act ". . . arbitrarily or capriciously, or out of line with Board policy or the Act's requirements." **Manning, Maxwell & Moore, Incorporated v. NLRB**, 324 F. 2d 857 (1963). In that case, a hearing was afforded and no abuse of discretion was shown to exist. However, even in "consent" elections, this Court has ruled that a hearing is an essential element of due process of law. **NLRB v. Sidran**, 181 F. 2d 671 (1950).[8]

The elections by "Stipulation" in the instant case made it incumbent upon the Board, rather than its Regional Director, to make ". . . a determination . . . of the facts ascertained after such . . . election, if such determination is necessary." 29 CFR, Section 102.62 (b). The Board's

[8] In **Sidran**, this Court relied upon the decision of the Supreme Court in **NLRB v. Indiana & Michigan Electric Co.**, 218 U. S. 9, from which it quoted: ". . . The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, **is heard and weighed**" (Emphasis added).

Regulations provide for Board-conducted hearings if "substantial and material factual issues" are raised by exceptions to an investigation report. 29 CFR, Section 102.68 (c) and (e).

(b) The Court treated the standard of review as if the conduct involved concerned only procedural election irregularities which were within the Board's discretion to finally determine. In "stipulated" election cases, this Court has consistently ruled, as have the other Courts of Appeals, that election cases do not come before the Court on direct review, but only upon a Company's refusal to bargain, which is the only method of review permitted under the statute, and that the complete record of the unfair labor practice case and the representation cases are fully reviewable. **NLRB v. Ortronix, Inc.**, 380 F. 2d 737, at 739 (1967). This Court has also ruled in cases of campaign propaganda where substantive issues are involved affecting the reasoned choice of the electorate, that the standard of review is to ". . . accept the Board's findings of fact so long as they are supported by substantial evidence on the record considered as a whole." **NLRB v. Houston Chronicle Publishing Company**, 300 F. 2d 273, at 277 (1962), citing **Celanese Corporation of America v. NLRB**, 291 F. 2d 224 (7th Cir.), *cert. denied*, 368 U. S. 925.

We respectfully submit that the Court in its Decision here misapprehended the proper standard of review in holding that the only question before the Court in an NLRB election review is whether the Board has "reasonably exercised its discretion." It cited in support of such proposition **Neuhoff Brothers Packers, Inc. v. NLRB**, 362 F. 2d 611, and **NLRB v. Laney & Duke Storage Warehouse Company**, 369 F. 2d 859, which involved "irregularities in procedures," which are not involved here. The rule of this Court is set forth in **Houston Chronicle**, which was also cited by the Court. In **Houston Chronicle**, there is no suggestion that this Court follows the rule of determining

if the Board "abused its discretion", as the instant Opinion infers (Pages 5-6), in this type of situation. **Houston Chronicle** makes it abundantly clear that the test is "substantial evidence".[9] A Hearing was also afforded in that case.

The instant case is comparable in all respects with **Houston Chronicle**, to the extent that the Board's evaluation of campaign propaganda in the first and second election was at issue, and the standard for review is clearly one of substantial evidence on the Record as a whole, which inherently would require a hearing where, as in the instant case, the Company's proffered undisputed evidence is not accepted in the light most favorable to it.

The Company here was charged with an unfair labor practice in violation of Section 8 (a) (5) of the Act in refusing to bargain. There is but one standard applicable to Court review of Board decisions finding a violation of law; i.e., "The finding of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Section 10 (e), 29 USCA, Section 160 (e). **Universal Camera Corp. v. NLRB**, 340 U. S. 474 (1950); **Houston Chronicle Publishing Co.**, *supra*.

III.

In keeping with the previously cited recent Decisions of this Court, where there is a stipulation for an election and there are substantial and material factual issues raised in the objections, once the objecting party makes a *prima facie* case, due process of law requires that there be a hearing at some point either in connection with the objections or in connection with the alleged unfair labor practice under the provisions of Section 10 (b) of

[9] "In determining whether the Board properly evaluated campaign propaganda, we accept the Board's findings of fact so long as they are supported by substantial evidence on the record considered as a whole." 300 F. 2d 273, at 277.

the Act (29 USCA, Section 160 (b)). The Company has not been granted a hearing, either in connection with its objections to the second election nor in connection with the findings that the Board made in the first election in relation to the campaign literature. A limited hearing was held in the first election, which did not involve any question of allegedly improper Company literature or the thrust of its campaign.[10]

Nonetheless, the Court characterizes the campaign, as did the Board, as "selecting the Union meant a plant shut down and consequent economic disaster" (page 5). Such finding by the Board and the Court is not based on the whole record, or a record made as a result of a hearing. It does not take into account the union's propaganda to which Company literature was responsive; the failure of the Company to be afforded an opportunity to demonstrate the Union responses and the Union state-

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[10] The Court overlooked (pages 2-3) the absence in the Record of substantial evidence to support the Board's finding that three of the Company's minor supervisors made threatening statements to **fifty** employees. The disputed evidence was that three minor supervisors made allegedly threatening statements in the presence of seven employees. The only "admission" by the supervisors concerning other than the seven who testified, was to "admit" that they had made legally permissible statements to other employees who worked under their supervision. The Board apparently adopted, and this Court apparently approved, the theory that the isolated statements found to have been made were spread "word of mouth". Such theory has been discredited:

> "To begin with, there were only these three isolated events in a plant comprising some six hundred employees and sixty supervisors. We are told now that undoubtedly these conversations were passed on from employee to employee by word of mouth, thus increasing their over-all impact. This theory is not analytically inevitable, since the above stated conversations were not such as to become a conversation piece among the employees. Further, we will not now speculate about a matter on which testimony could easily have been elicited if it had been thought important."

NLRB v. Garland Corporation, 396 F. 2d 707, 709; 68 LRRM 2629 (1st Cir., 1968).

ments to which it responded; and the proper inferences[11]

IV.

to be drawn from the entire campaign.

The Court, moreover, by adopting a statement from the Board's Brief, erroneously found:

> "The Board contends that the message which the Union sought to advance was that the textile industry was lagging behind other unionized industries as to wage rates. With this central message and the Pepperell employees receiving an average of $1.80 an hour, the Board found the 20 to 30 cent discrepancies listed above as not in fact constituting any real interference."

Page 6.

The undisputed evidence in the Record shows that the employees of the Company's plant averaged $1.907 per hour (STR 168) and, moreover, that there were rates in effect at the Company's plant of $2.56 per hour (STR 275-276). The Union was asking employees to vote for the union because "It is time that you, a skilled, intelligent textile worker, received the wages and fringe benefits that the other basic American industrial workers receive" (STR 261). The thrust of this approach accompanied by misrepresentations over the signature of the Business Agents of the unions who allegedly had obtained the rates that they claimed were paid in Rome to other "basic American industrial workers" and the variation between the actual rates that these unions had obtained in Rome and the rates actually received by the Pepperell Workers, constituted a material misrepresentation and interference. When it was contended that Inland Container Corporation employees **in Rome** averaged $2.75 an hour, when as a matter of fact they averaged $2.54, and when as a matter of fact the Company here had rates in excess of $2.54, this becomes a material

[11] See Footnote 1, *supra.*

misrepresentation. The same is true as to the misrepresentations in connection with Rome Kraft and General Electric and other wage misrepresentations. Horsley's affidavit shows that up to the time of the election the Company had not been able to obtain correct figures, which, when obtained, showed that the rates listed by the Union had been materially misrepresented (TR. 154-155; 171-175).

It is clearly a question of fact of whether or not the Company had an opportunity to obtain the correct wage information and to answer or correct the wage rate misrepresentations made by the Unions either in their ad on Sunday or in their leaflet on Wednesday by the time of the election on Thursday. Horsley's affidavit, which stands undisputed in the Record, states that the publication of the ad on Sunday had no impact, but that the distribution of the leaflet on Wednesday had appreciable impact upon the employees. Moreover, he states that he was unable to obtain the correct information until after the election on Thursday. This, too, is undisputed.

We submit that all of the elements which establish that the Company's constitutional right to due process was denied by the Board as a result of the denial of a hearing are present here, and that the Decision of this Court misapprehended or overlooked this issue in the posture in which it considered this case.

(a) There were misrepresentations of fact (conceded by the Regional Director and the Board) as to wages obtained by the Unions under their contracts in the Rome area. (These were the same unions who acted as co-sponsors with the Textile Union in its efforts to organize the plant.)

(b) There was undisputed evidence that the misrepresentations had an impact on the employees prior to the election, and that they were substantial, material, and con-

sistent with the Union's campaign theme that voting for the Union would result in the Company's employees receiving the wage rates and benefits of other unionized employers in the Rome area;

(c) There is clear evidence that the misrepresentations were made in the name of and by persons whom the employees at the Company's plant would have every reason to believe were in the best position to know the true facts —namely, the Business Agents who negotiated the contracts in which these alleged rates appear (See **Houston Chronicle**, *supra*); and

(d) There is at the very least a material dispute of fact as to whether or not the Company had ample time to reply to, or correct the Union's misrepresentations.

The only evidence before the Board and its Trial Examiner were the undisputed affidavits of Horsley, who swore that it took him several days from the time of the circulation of both the newspaper ads and the leaflet by the Union to ascertain and to discover the true facts as to the wage misrepresentations and their scope. The Board's findings, *ex parte* and by inference, that this misrepresentation was *de minimis;* the Board's finding that these misrepresentations were not by parties who the Company's employees would not believe to have special knowledge of the facts; and the Board's findings that the Company had ample time and opportunity to obtain the correct wage figures and to reply to the misrepresentations before the election, are all factual matters about which evidence must be adduced in order to preserve the Company's right to due process. Otherwise, the facts asserted in the Company affidavits must be accepted as being true and as being the **only** "substantial evidence in the Record."

The Panel of the Court here did not follow the precedents of this Court as set forth in the **Neuhoff** case, *supra*, in this regard. Because of the Panel's departure in the

instant case from the precedents of this Court, as evidenced by the Decisions of its other panels as to constitutional due process rights to a hearing, it is respectfully submitted that this matter should be reheard by the Court *en banc*. An *en banc* decision of this Court is required in order that the law in this Circuit as to constitutional due process rights where summary judgment is involved will be settled and consistently applied not only to this Company but also to all other parties litigant before this Court.

Wherefore, the Company prays:

(1) That the Court grant its Motion for Rehearing of this matter, and that said Motion for Rehearing be considered by the Court *en banc*, pursuant to Rule 12 of this Court, in view of the constitutional questions raised by this Motion and the apparent conflicts between the Decision in the instant matter and Decisions of other panels of this Court on like matters; and

(2) In the alternative, that the Court remand the case to the Board for a hearing involving the free speech issues decided in connection with the first election without affording the Company an opportunity to be heard, and for a full hearing upon the validity of the Company's Objections to the second election.

Respectfully submitted,

PEPPERELL MANUFACTURING COMPANY,

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FRANK A. CONSTANGY,
Of Counsel.

December 12, 1968.

CONSTANGY & PROWELL,
1900 Peachtree Center Building,
Atlanta, Georgia 30303,
Counsel for Petitioner.

Certificate.

The undersigned of Counsel for Petitioner does hereby certify that the foregoing Petition for Rehearing and Petition for Rehearing En Banc is filed in good faith and in the belief that substantial rights of the Petitioner are effected thereby and that said Petition is not filed for purposes of delay. The undersigned Counsel for Petitioner certifies that a copy of the foregoing Petition for Rehearing and Petition for Rehearing En Banc has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

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Frank A. Constangy.

APPENDIX G.

In the
United States Court of Appeals
For the Fifth Circuit

No. 24955

Pepperell Manufacturing Company,
Petitioner,
versus
National Labor Relations Board,
Respondent.

Petition for Review of an Order of the National Labor Relations Board (Georgia Case).

On Petition for Rehearing En Banc

(January 21, 1969)

Before Bell and Morgan, Circuit Judges, and Guinn, District Judge.

Per Curiam: The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is Denied.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1260

PEPPERELL MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A25-30) is reported at 403 F. 2d 520. The Board's decision and order (Pet. App. A8-20) are reported at 166 NLRB No. 24.

JURISDICTION

The judgment of the court of appeals (Pet. App. A32) was entered on December 2, 1968, and a peti-

tion for rehearing was denied on January 21, 1969 (Pet. App. A52). The petition for a writ of certiorari was filed on April 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the Board properly overruled the employer's objections to a representation election without holding an evidentiary hearing, upon finding that the objections presented no material issues of fact.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. A1-7.

STATEMENT

A. The Representation Proceedings

Pursuant to a stipulation of the parties a representation election was held at the Pepperell Manufacturing Company's plant in Lindale, Georgia on March 5, 1965. The union [1] lost the election and filed objections with the Board's Regional Director, alleging that the company had threatened the employees with a plant shutdown, layoffs, and a refusal to sign any agreement, should the union win the election (R.

[1] Textile Workers Union of America, AFL-CIO.

32-33).[2] The Board set the matter down for hearing (R. 56).[3] The hearing examiner found that the company had made threats to approximately 51 employees that it would shut down the plant if the union prevailed, and had waged an intensive campaign which stressed the inevitability of economic loss following unionization (R. 46-47). The Board set aside the election (R. 59) and a second election was scheduled for August 4, 1966 (R. 64).

The union won the second election (R. 67) and the company filed objections. It contended that in its leaflets the union had deliberately misrepresented the profit picture of the textile industry, the wages received by unionized employees in other industries in the area, and the provisions of the company's pension plan. The company also contended that the union, in its propaganda, had named a neighboring Teamsters local as endorsing its campaign when that local had not authorized the use of its name, and that the union had falsely stated that the company intended to lay off certain employees (R. 74-78).

After an administrative investigation of the company's objections, the Regional Director found that: (1) the leaflet concerning layoffs was labeled "Our Prediction" and, as such, "constitute[d] legitimate campaign propaganda" (R. 95); (2) even if the Teamster local had not authorized use of its name, there

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[2] "R" references are to the transcript of record in the court below.

[3] See 102.69(c) of the Board's Rules & Regulations, 29 C.F.R. 102.69(c).

was no impairment of employee free choice, since the benefits received by that local's members were accurately stated and the local knew the information it provided would be used in the election campaign (R. 84-88); (3) even if the profits in the textile industry were misstated, the matter was *de minimis*, since the company's *own* profits were not misrepresented, and, further, the company had about two weeks to reply to this leaflet (R. 92-93); (4) any inaccuracies as to the wages of unionized employees in the area "could only have had a *de minimis* effect * * * [as] it is clear that the employees referred to in the ad were employed in industries different than the Employer * * * [and] there was no claim that the [union] had itself obtained the benefits for the employees referred to in the ad * * *" (R. 90); and (5) "assuming [the union's] assertions with respect to the pension plan were false, it is manifest that the Employer had an opportunity to counter such assertion, when the first attack on the pension was made on July 20" (R. 94). The Regional Director concluded that the company's objections should be overruled and the union certified (R. 97).

The company filed exceptions to the Regional Director's report with the Board, contesting his conclusions and his failure to order a hearing on the objections (R. 100-109). The Board upheld the Regional Director, concluding that, "Even considering the 'totality' of [the union's] conduct herein, as requested by the Employer, we do not find sufficient warrant for setting aside the election" (R. 112, n. 2). The Board added: "With respect to * * * certain al-

leged misrepresentations of wage rates of union employees * * *, we note that the said information was first disseminated on July 31, 1966, and was merely repeated on August 3. Thus, there was ample time for an Employer reply before the election * * *. Further, the wage information was not such as fell within the special knowledge of the [union]" (R. 112-113). Accordingly, the Board certified the union as the employees' representative (R. 113).

B. The Unfair Labor Practice Proceeding

The company refused to bargain, and an unfair labor practice complaint issued. The trial examiner granted the General Counsel's motion for summary judgment, finding that there were no issues that had not been decided in the representation proceeding and no new evidence (Pet. App. A13-14). The Board adopted the trial examiner's decision, holding that the company had violated Section 8(a)(5) and (1) of the Act, and ordered the company to bargain with the union upon request (Pet. App. A8-9, 17-18).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. A30).

ARGUMENT

The first question posed by petitioner (Pet. 2)—whether "a formal hearing [must] be afforded a party * * * where disputed issues of material fact are shown to exist"—is not presented on this record. As shown above, the Board accepted the company's primary factual allegations as true, but found that they

did not warrant setting the election aside.[4]

Thus, the only question presented is whether the Board reasonably concluded that the union's alleged misstatements did not interfere with the employees' free choice in the election. The Board's conclusions were reasonable, as the court of appeals found, and there is no reason for this Court to review them further. Contrary to petitioner's assertion, the question whether the conduct assumed to have occurred warranted a setting aside of the election was primarily a matter for the sound discretion of the Board. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226; *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. Thus, the court of appeals applied the correct standard of review in this case.

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[4] Petitioner's contention that there was a controversy over its ability to make timely reply to the union's wage misrepresentation (Pet. 5) is really a quarrel with the conclusion which the Board drew from the undisputed facts in the record. Thus, the Board held that four days were sufficient for the company to ascertain the facts, where, as here, they were not within the peculiar knowledge of the union (*supra*, pp. 4-5). The company's affidavit does not controvert this conclusion; it merely discloses that the company did not make a concerted effort to obtain the facts until the leaflet reappeared on the day before the election and that they were readily available when that effort was made (R. 154, 171-175).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1969.

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ME COURT ...

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No. 1260.

IN THE

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OCTOBER TERM, 1968.

PEPPERELL MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

INTRODUCTION.

Pepperell Manufacturing Company (referred to herein as the Petitioner) has petitioned for a writ of certiorari to review the Decision of the United States Court of Appeals for the Fifth Circuit in this matter. The National Labor Relations Board (referred to herein as the Respondent) has filed its Brief in Opposition to the Petitioner's Petition. The Brief in Opposition raises an argument for the first time, to which this Reply Brief is addressed pursuant to Rule 24 (3).

STATEMENT.

The Record does not support arguments contained in Respondent's Brief which seek to justify the failure to afford Petitioner a Hearing on its Objections to a Representation Election.

At Page 6, Footnote 4 of Respondent's Opposition Brief, it is for the first time asserted by the Board's appellate Counsel that the issue of the Company's ability to make timely replies to the Union's misrepresentations was a matter of **undisputed** fact.[1] The disputed fact issues, which have been ignored throughout the proceedings below, included the very issues which the Board's appellate counsel now asserts were not disputed.

Whether or not the Company had ample opportunity to reply to wage misrepresentations is a disputed issue of fact. The Board had no factual evidence before it upon which to conclude that the Company "did not make a concerted effort to obtain the facts" or that the facts were "readily available", and the **only** evidence before the Board was (1) the Company **did not know** that the wage representations (made by a Union which was a part of the Union Trade Council whose members negotiated the wages) were **in fact misrepresentations** until **after** the election, and (2) that despite prompt and diligent efforts to

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[1] "Petitioner's contention that there was a controversy over its ability to make timely reply to the union's wage representation (Pet. 5) is really a quarrel with the conclusion which the Board drew from **the undisputed facts in the record.** Thus, the Board held that four days were sufficient for the company to ascertain the facts, where, as here, they were not within the peculiar knowledge of the union (*supra*, pp. 4-5). The company's affidavit does not controvert this conclusion; it merely discloses that **the company did not make a concerted effort to obtain the facts** until the leaflet reappeared on the day before the election and that **they were readily available when that effort was made** (R. 154, 171-175)." (Emphasis added.) Opposition Brief, Page 6, Footnote 4.

determine the **true** facts when the wage misrepresentations became a key issue in the Union election, it was unable to gain meaningful evidence of the falsity of the representations until **after** the vote had been conducted. Contrary to the Board's footnote assertion, the true facts were not "readily available".[2]

The Board has not held that "four days were sufficient for the Company to ascertain the facts" and the Board has not held that the information was "readily available". The Board, in an *ex parte* election proceeding, simply held, without explanation, that there ". . . was ample time for an employer reply before the election . . ." and that the wage information was not such as fell within the special knowledge of the Union. In seeking a hearing on the unfair labor practice charges following the Board's erroneous ruling in the election proceeding, the Company contradicted by affidavit the Board's *ex parte* election findings. The Board did not challenge the evidence submitting including (1) that the Company ". . . did not know that the wage and fringe benefit representations in the advertisement were false (Tr. 152), and (2) the evidence that the Company was not able to obtain the information concerning the truth or falsity of these representations

[2] The Board's references to the Record to support the assertion that the information was readily available pertain to an affidavit made on August 24, following the election on August 4, which affidavit recites evidence of the Union's misrepresentations to the extent they were then available; but, even at this time, some three weeks following the election, at least two of the companies contacted had been unable to calculate the average hourly pay information which the Company was requesting in support of its objections to the election (Tr. 174-175). The Record shows that the only successful effort that the Company was able to make **prior** to the election in securing information to which the Board refers (Tr. 154), revealed that the wage and fringe benefit representations were correct, unlike the misrepresentations which were subsequently discovered. The only inaccurate information discovered **prior** to the election concerned sponsorship and this was publicized to at least some of the voters within the remaining time prior to the election.

until after the election . . . ." (Tr. 154). The Board has never ruled that the information was readily available. In response to Counsel's assertion to the contrary, the affidavit offered in opposition to summary judgment dated April 21, 1967, more than eight months after the election, states:

> "I would like to add that some of the companies whose wages and fringe benefits were represented in the advertisement and leaflet **have still not furnished us the information upon which we could determine the truth or falsity of such representations despite my continued attempts to obtain this information, both before and after the election**" (Tr. 155). (Emphasis added.)

This same affidavit which was submitted in opposition to summary judgment and seeking a hearing is replete with statements and allusions which firmly contradict the inference that the information was "readily available".[3]

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[3] See, *e. g.*:

". . . When I attempted to obtain information from management people connected with these various companies, I, of course, quickly discovered that they were reluctant to inject their companies in our labor dispute . . . ." (Tr. 153).

". . . my contacts with people at these plants before and immediately after the election met with the response that the information I sought to verify contained in the advertisement and leaflet was not immediately available and that they would call me back. In some instances, I was told that the person I was talking with did not have the authority to give me this information and I was referred to other people. However, despite my efforts during this period of time and particularly after the impact of the leaflet distribution on the afternoon of August 3, I was not able to obtain the information concerning the truth or falsity of these representations until after the election with the exception of the representations made concerning Carolina Freight Carriers . . ." (Tr. 154).

"Due to the large number of misrepresentations and distortions of truth and misstatements, as well as half truths, in rumors that were being circulated in our plant, as well

SUMMARY.

The Board's failure to provide a hearing has led its appellate Counsel to engage in "post hoc rationalizations for agency action . . ." which this Court has consistently ruled are unacceptable if the integrity of the administrative process is to be preserved. **Burlington Truck Lines v. United States,** 371 U. S. 156 at 168. This Court has long made it clear that when the Board exercises discretion given to it by Congress it must "disclose the basis of its order" in order that its action can properly be reviewed. **Phelps Dodge Corporation v. Labor Board,** 317 U. S. 177, at 197. We submit that the Board may not, either through the denial of an administrative hearing or the failure to articulate its reasons for decision and thus ignore crucial issues of fact, escape the mandate of this Court expressed in **NLRB v. Metropolitan Insurance Company,** 380 U. S. 438:

> "For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process or it would 'propel the Court into the domain which Congress has set aside exclusively for the administrative agency'. **Securities & Exchange Commission v. Chenery Corp.,** *supra*, 332 U. S. at 196, 91 L. Ed. at 1999."
>
> *supra*, at 444.

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as leaflets being distributed by the Union, it was a physical impossibility for me or the Company to check the accuracy of all of these misrepresentations . . ." (Tr. 156).

". . . It would also have been a physical impossibility for us to have even attempted to answer the many and varied misrepresentations and false statements above referred to . . ." (Tr. 157).

". . . there was no time in which to answer these false and deliberate untruths made by the Union" (Tr. 157).

Consistent with Metropolitan, it is submitted that this Court should grant certiorari and vacate the judgment of the Court of Appeals, with a remand of the matter to that Court with a direction to return the matter to the Board for a hearing on the disputed factual issues.

Respectfully submitted,

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